IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 351

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

—v.—

WALTER F. TELLIER and EVELYN H. TELLIER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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Opinions Below

The memorandum opinion of the Tax Court (R. 4) is not officially reported. The opinion of the Court of Appeals (R. 10) is reported at 342 F. 2d 690.

Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1965 (R. 20). Mr. Justice Harlan extended the Commissioner's time for the filing of a petition for writ of certiorari to July 16, 1965 (R. 22). Certiorari was granted on October 11, 1965 (R. 23). The Court's jurisdiction is invoked under 28 U. S. C. §1254(1).

Question Presented

When the Commissioner admits that expenditures for a defense against criminal charges are otherwise ordinary and necessary expenses paid in carrying on a trade or business, may he, nevertheless, disallow a deduction for such expenditures for the sole reason that the defense failed?

Statute Involved

Internal Revenue Code of 1954:

Sec. 162. Trade or Business Expenses.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * * .

SUMMARY OF ARGUMENT

POINT I

A & B. The contention that "overriding public policy" requires the disallowance of counsel fees paid in an unsuccessful criminal defense, though such fees otherwise fully satisfy the statutory requirements for allowance, has never enjoyed full judicial support. The chronological table (appendix, pp. 37-39 *infra*) establishes that beginning with 1924, the Board of Tax Appeals apparently supported the Commissioner's contention, but that a conflict in the courts of appeals developed immediately. Thereafter, both the Tax Court and the Commissioner accepted this Court's decision in *Commissioner* v. *Heininger*, 320 U. S. 467 (1943),

which had resolved the conflict, as dispositive of the issue, regardless of whether the fees had been paid for a defense in an administrative hearing or in a criminal trial.

Thereafter, the issue seems to have disappeared as a cause for litigation, until the Tax Court revived it in 1956, by making the distinction between administrative and judicial proceedings. However, there does not seem to be a single later decision of any court other than of the Tax Court in which "overriding public policy" has been applied as the basis for disallowance of counsel fees.

The Commissioner's unqualified support of the view that *Heininger* had laid the issue completely to rest is proved by the fact that such was the thrust of G. C. M. 24377, 1944 Cum. Bull. 93, issued in 1944. The Commissioner's official position remained unchanged until G. C. M. 24377 was modified in 1962 by Revenue Ruling 62-175 (1962-2 Cum. Bull. 50). Consequently, contrary to the suggestion made by the Acting Solicitor General, the government's official position that "overriding public policy" requires the disallowance of certain counsel fees really dates no earlier than 1962. (The original decision by the Board of Tax Appeals in 1924 did not enforce a formally issued Commissioner's ruling.)

However, when the 1954 recodification of the Internal Revenue Code was enacted, it was G. C. M. 24377, and not Revenue Ruling 62-175, that stated the Commissioner's official interpretation of the statute. Since the pertinent section was reenacted unchanged, the presumption of ratification attaches to G. C. M. 24377, and it should be presumed that Congress intended no such distinction between administrative and criminal proceedings as was drawn by the Tax Court.

C. It is submitted that this Court's decisions on the overall question of the validity of "overriding public policy" as a basis for disallowances do not support the belief that it will approve its application to attorney fees. Since *Textile Mills Securities Corporation* v. *Commissioner,* 314 U. S. 326 (1927), the decisions would rather suggest an integrated policy of restricting expansions in the area of application of "overriding public policy."

POINT II

The same observation would nevertheless seem to be true of *Tank Truck Rentals, Inc.* v. *Commissioner,* 356 U. S. 30 (1958), though it disallowed fines on the ground that such disallowance was required by public policy. It is suggested that the decision represents the resolution of a unique problem, and should not be extended beyond the narrow necessities of the facts in that case.

Indeed, the use of a public policy contention in connection with counsel fees is singularly inappropriate. While it is possible to say of lobbying expenses that they were outside the sanction of law, and of the taxpayer's practice of balancing the tax cost of fines against the economic cost of observance of law that such activity could not be countenanced, denunciation of the use of counsel in a defense against criminal charges is completely unthinkable. Not only is it unthinkable, but no conclusion is possible other than that public policy supports and encourages the use of counsel in those circumstances.

Moreover, there is singular vice in any contention that analogizes fines with expenditures for counsel for the express purpose of attributing to the tax burdening of

the employment of counsel the same efficacy to suppress crime as it does in the case of fines. And, to justify that analogy, particularly, by claiming support in this Court's decision in *Tank Truck Rentals, Inc.* v. *Commissioner, supra,* is to deny the plain record of this Court's devotion to the principle that the right of an accused to counsel is a noble and distinguishing feature of our law.

POINT III

A. The Commissioner has discriminately selected the deduction of counsel fees in criminal proceedings for exclusive application of the "overriding public policy". Such fees, however, are the only fees that are specifically within the area of protection by a Constitutional guarantee. Therefore, his claim of support of Congressional intent brings the controversy within Constitutional stature, because it must be presumed that Congress would not abridge a Constitutional guarantee.

B. Although it is no longer certain that Congress discharges its obligation under the Constitutional guarantee of counsel for defense in a criminal proceeding simply by remaining neutral, the corollary question whether Congress is obliged to subsidize the Constitutionally protected right is not present here. That is so, because allowance of a business deduction does not subsidize a taxpayer. On the other hand, the economic effect of a disallowance of a business deduction is clearly and definitely a penalty. The revenue does not suffer a single penny loss when an otherwise deductible business expense is allowed by the Commissioner, but it does exact an additional amount when the deduction is disallowed.

The disallowance of such loss creates fictitious income, thus destroying the integrity of the tax law. Thereafter, the taxpayer's taxable income no longer bears any relation to his real income. Inevitably, the taxpayer's liability for taxes is fixed by the size of the disallowance and the taxpayer's total income rather than by his real income or by his ability to pay. Hence, application of "overriding public policy" makes a mockery of the basic sociological advance incorporated in the tax law that the cost of government should be borne in proportion to ability to pay. Congress, it is submitted, did not intend to perpetrate a monstrous deceit.

C. The fact that the Commissioner applies the penalty of "overriding public policy" exclusively to counsel fees in criminal prosecutions, and not to any other business expense remotely related to an illegal act, is proof enough that the Commissioner is engaged in a discriminatory policy that would amount to abridgment of the Constitutional guarantee, were it sanctioned by Congress. But, the vice of the Commissioner's policy strikes even deeper.

The penalty of a large and frequently financially crippling additional tax that results when a true business expense is transmuted into fictitious income by the disallowance of a business expense must be paid out of the taxpayer's real resources. No deduction for any other business expense is subjected to the same hazard of fate as is the deduction for counsel fees in a criminal proceeding. Of all the deductions that may arise out of the act that resulted in the charge, only the taxpayer's deduction for counsel fees is dependent on his victory in court. Moreover, the relative size of that tax penalty is determined by the degree of resistance with which he meets the charge. The

more he resists, the larger his cost of defense, and the greater his tax penalty, should he lose.

Indeed, the taxpayer treads a cycle. He cannot plan his defense unless he knows what resources are available for the defense; and he does not know the latter until the last appeal has been decided, because until that decision is made, he cannot foretell whether he was or was not able to devote all his funds to his defense.

The Commissioner forces the taxpayer to put up the penalty as a stake, before he elects to defend against the charges. The Commissioner adds a hazard, not to the outcome of the trial, but to the choice of whether or not to defend. He forces the taxpayer to consider the possibility of a tax penalty at every stage of the defense. It can have no other effect than to exert pressure against the choice of defending.

A government that subjects a taxpayer to an additional and further penalty for the sole reason that he elected to defend himself against a charge of a crime—and lost, is enforcing a medieval concept of justice. Surely, Congress would have no part of it.

ARGUMENT

I.

The Commissioner incorrectly claims acceptance of the view that, by itself, defeat in any criminal prosecution works a forfeiture of the taxpayer's statutory right to deduct attorney fees.

A. *The Tax Court Belatedly Revived a Discredited Doctrine*

The government's initial drive to get this Court's approval for the doctrine that a lost defense against charges of misconduct makes counsel fees invariably nondeductible was halted in *Commissioner* v. *Heininger,* 320 U. S. 467 (1943). In that case, the Commissioner had disallowed counsel fees incurred by a dentist in an unsuccessful effort to reverse a departmental order barring him from access to the mails because his mailings had been found to be fraudulent and misleading. The Board of Tax Appeals sustained the Commissioner under the mistaken idea that the denial of the deductions was required as a matter of law.[1]

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[1] As the following shows, this Court did not view the Board's decision as part of a firmly established rule, consistently followed by the Board: " . . . [the Board] did not deny the deductions claimed by respondent upon *its own interpretation of the words "ordinary and necessary"* as applied to its findings of fact. . . . The interpretation it adopted was declared to be required by the Second Circuit's reversal of the Board's view in *National Outdoor Advertising Bureau, Inc.* v. *Commissioner,* 32 BTA 1025. . . ." *Commissioner* v. *Heininger,* 320 U. S. 467, 470-471 (1943). ". . . the Board of Tax Appeals here denied the claimed deduction not by an independent exercise of judgment but upon a *mistaken conviction that denial was required as a matter of law. . . .*" *Id.* at 475. (Italics supplied.)

In support of his position, the Commissioner had argued: (1) That it is not an ordinary and necessary expense of doing business to employ counsel in defense of charges of violation of law, (2) That carrying on a business means doing business lawfully, so that unlawful action must be considered as the personal wrong-doing of the taxpayer, and (3) That even if the Commissioner were wrong in the first two contentions, the counsel fees were nevertheless nondeductible because of the connection of those fees with the taxpayer's wrong-doing.

The Court rejected all three contentions. To the first, the Court replied that since the law-suit was clearly the direct result of the taxpayer's business, and since it is the normal procedure to employ counsel in a law-suit, the fees paid to such counsel certainly were ordinary and necessary expenses of doing business. Of the second contention, the Court said that the "reasoning, though plausible, is unsound . . ." because it is both ordinary and necessary for a taxpayer to try to protect the very existence of his entire business. (*Id.* at 472.)

The third contention produced the remote relation rule (*id.* at 474), which, it is submitted, may be paraphrased as follows: There has never existed any rule of law that makes an otherwise deductible expense nondeductible only because such expense has a secondary relation to an unlawful act.

Since the counsel fees had been incurred in a law-suit that was the proximate result of the taxpayer's business, deductibility was not forfeited simply because it was the taxpayer's misconduct that had created the law-suit.

Although the precise holding of *Heininger* is that the cost of an unsuccessful defense against an administrative de-

termination of violation of law is not barred by reason of considerations of public policy, the reasoning is broad and general, applying equally to counsel fees in any law-suit. That it was so then understood, there is no doubt, as is established by the subsequent action of both the Tax Court and the Commissioner.

The very next year, the Tax Court decided *Longhorn Portland Cement Company,* 3 T. C. 310 (1944), holding that *Heininger* required the allowance of deductions for counsel fees and fines resulting from an uncontested state prosecution for violation of state antitrust statutes. The Commissioner acquiesced in the part of the decision allowing such counsel fees (A., 1944 Cum. Bull. 43), but appealed from the Tax Court's allowance of the fines.[2] The Commissioner also published G. C. M. 24377, 1944 Cum. Bull. 93, in which *Heininger* was read as requiring the allowance of deductions for counsel fees in an unsuccessful defense against criminal charges of violation of the Sherman Antitrust Act.

At this point, since both the Tax Court and the Commissioner had agreed that within the rule of *Heininger,* the cost of an unsuccessful defense against charges of misconduct, whether brought in a criminal court or before an administrative agency, was deductible (provided the matter was the proximate result of the taxpayer's business), the law was well-settled on the basis of the *Heininger* rule. And, the law remained that way, well-settled, from 1943 to 1956, a period of 12 years.

[2] In *Commissioner* v. *Longhorn Portland Cement Company,* 148 F. 2d 276 (5th Cir. 1945), the allowance of fines was reversed.

Not until *Thomas A. Joseph*, 26 T. C. 562 (1956), did the Tax Court have a change of heart.[3] In that decision, the Tax Court for the first time propounded the distinction between administrative determinations of guilt and verdicts of criminal guilt. The Tax Court reasoned that since the context of the *Heininger* decision was that of an administrative determination, and since this Court had listed *Burroughs Bldg. Material Co.* v. *Commissioner*, 47 F. 2d 178 (2d Cir. 1931), in footnote 8 (320 U. S. 467 at 473), it was apparent (to the Tax Court) that the *Heininger* principle applied only to administrative determinations and that this Court had intended to preserve the *Burroughs* rationale by its citation of that decision in the footnote.[4]

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[3] In the intervening case of *Anthony Cornero Stralla*, 9 T. C. 801, 820-821 (1947), the Tax Court held that deductions for legal fees and fines resulting from the illegal operation of a gambling ship were barred by the public policy doctrine. It distinguished *Heininger* on the basis of a distinction between expenses resulting from an unlawful act in a lawful business and lawful expenses in an illegal business. (" . . . [u]nlike the *Heininger* case, the business here carried on, . . . was illegal.") In *Longhorn*, like in *Heininger*, the business had been lawful. (The *Stralla* distinction was swept away in *Commissioner* v. *Sullivan*, 356 U. S. 27 (1958).)

[4] The Tax Court overlooked that *Burroughs Bldg. Material Co.* v. *Commissioner, supra*, had been listed in the very same footnote in which *Helvering* v. *Superior Wines & Liquors, Inc.*, 134 F. 2d 373 (8th Cir. 1943) had also been listed as analogous in principle with *Burroughs*. (This Court cited the latter after the signal "cf." apparently only to indicate that it differed from *Burroughs* by reason that whereas *Burroughs* disallowed attorney fees after conviction, *Superior Wines* went further to also disallow attorney fees in any law-suit involving a "penal" statute even such that had been settled by compromise of penalties.) Since certiorari had been granted in *Heininger* (*Commissioner* v. *Heininger*, p. 13, fn. 5, *infra*) to resolve the conflict with *Superior Wines*, it seems plain that the Court also indicated that it was reviewing the reasoning of the decision in *Burroughs* as well as the decisions in the two cases in which certiorari had been granted. Because this Court reversed *Superior*, it should be plain that the principle of *Burroughs* was thereby also rejected.

With the *Joseph* decision, the Tax Court, therefore, reversed its position and revived the public policy doctrine in the case of counsel fees (when the business itself was lawful) as an instrument to destroy the deductibility of counsel fees in an unsuccessful criminal defense.

The Commissioner, however, held back for another 6 years. Not until 1962, did the Commissioner publish Revenue Ruling 62-175, 1962-2 Cum. Bull. 50, in which the Tax Court's distinction between administrative and criminal determinations was finally formally accepted, and counsel fees in unsuccessful defenses against criminal charges of violation of the antitrust laws were thereafter ruled to be nondeductible. The Commissioner also explained his reversal of policy by the statement that in G. C. M. 24377, he had erred in the application of the *Heininger* rationale.

Hence, it is quite plain the government is wrong to claim 40 years of acceptance for the application of a rule that counsel fees in an unsuccessful criminal defense are unallowable because of "overriding public policy" (Pet. Br. pp. 3, 6). The truth is that the policy had never been accepted by this Court, the Tax Court did not enforce it in the case of a lawful business between 1944 and 1956, and the Commissioner, himself, had entirely abandoned it between 1944 and 1962.

B. *Since Heininger, No Court Supports the Revival of the Doctrine*

The government also errs in claiming the endorsement of "every court of appeals that had passed upon the question, as well as . . . the Court of Claims . . ." (Pet. Br. p. 4). The government completely misreads the story told by its own citation of authorities in footnotes 5, 6 and 7 (Pet. Br. p. 4).

Burroughs Bldg. Material Co. v. *Commissioner,* 47 F. 2d 178 (2d Cir. 1931) and *National Outdoor Advertising Bureau* v. *Helvering,* 89 F. 2d 878 (2d Cir. 1937) were both pre-*Heininger* cases. To this list, the government should properly add *Heininger* v. *Commissioner,* 133 F. 2d 567 (7th Cir. 1943) in which case the Seventh Circuit had rejected the doctrine.[5]

Footnotes 6 and 7 (Pet. Br. p. 4) list the post-*Heininger* decisions. However, the earliest case cited is *MacCrowe's Estate* v. *Commissioner,* 240 F. 2d 841 (4th Cir. 1956). Naturally, there is none between *Heininger* and 1956, the period during which the doctrine was a dead issue in both the Tax Court and in the Commissioner's office. More significant, however, is the fact that though these post-*Heininger* decisions disallow counsel fees, not one, as is shown below, bases its conclusion on "overriding public policy."

Every such cited case, but the two Fourth Circuit cases, involves the deduction of counsel fees incurred in prosecutions for filing false personal income tax returns. Of these, so involving the filing of false income tax returns, all except *Hopkins* v. *Commissioner,* 271 F. 2d 166 (6th Cir. 1959) presented the distinctly different question whether the cost of defending a charge not related to the taxpayer's business became a business expense because conviction of

[5] Certiorari was granted in *Commissioner* v. *Heininger, supra,* to resolve the conflict between the Seventh and Second Circuits. Indeed, the Tax Court relied on that very fact in its *Longhorn Portland Cement Company* decision (3 T. C. 310, 318 (1944)). The Tax Court reasoned that since certiorari had been granted to resolve the conflict with the Second Circuit's decision in *National Outdoor Advertising Bureau,* affirmance of the Seventh Circuit's decision could mean only that the view of the Second Circuit had been rejected (also see p. 11 *supra,* fn. 4).

that charge would destroy the business. Hence, the question really involved the proximate relation rule of *Kornhauser* v. *United States,* 276 U. S. 145 (1927). Although the Commissioner may have also argued "overriding public policy" in these cases, the decisions were all bottomed on the threshold question of proximate relation and not on "overriding public policy."

Indeed, in *Port* v. *United States,* 163 F. Supp. 645 (Ct. Cl. 1958), and in *Tracy* v. *United States,* 284 F. 2d 379 (Ct. Cl. 1960), the Court of Claims was very precise in placing its decisions on the basis of the failure of the taxpayers to satisfy the proximate relation rule established in *Kornhauser* v. *United States, supra,* and not on the Tax Court's public policy doctrine (*Tracy* v. *United States, supra* at 381).

In *Bell* v. *Commissioner,* 320 F. 2d 953 (8th Cir. 1963), too, the Court said that the effect of a conviction on the taxpayer's accounting practice was an insufficient basis for allowance of the counsel fees, because the prosecution for filing a false tax return did not result from a business act or activity, but rather from the taxpayer's "personal misconduct."

In *Acker* v. *Commissioner,* 258 F. 2d 568 (6th Cir. 1958), the Court supplied only a laconic affirmance of the Tax Court's decision, but in the affirmed decision (T. C. Memo. 1957-18 (1957), 16 CCH Tax Ct. Mem. 89), even the Tax Court did not apply the public policy doctrine, but rather held that the effect of a tax conviction on an attorney's practice was only incidental, the conviction not having resulted from the taxpayer's professional activities. The other Sixth Circuit decision, *Hopkins* v. *Commissioner,* 271

F. 2d 166 (6th Cir. 1959), supplies no precedent. The posture of the controversy was that the taxpayer merely asked for allocation of legal fees between the services performed by the attorney in civil matters and in an effort to forestall indictment for filing a false return.

In *Peckham* v. *Commissioner,* 327 F. 2d 855 (4th Cir. 1964), the Court disallowed counsel fees incurred by a physician convicted of criminal abortions. The Sixth Circuit distinguished between abortions medically required and those defined as criminal. It held the latter to be personal acts and not within the taxpayer's profession. Having thus decided, the Sixth Circuit refused to discuss the public policy issue (at 856).

None of the cases cited by the government was decided by application of "overriding public policy"; hence, it is apparent that there is no post-*Heininger* support for that policy in any of the courts of appeals, nor in the Court of Claims. Only the Commissioner and the Tax Court cling to the discredited doctrine. Indeed, in the circumstances of the Commissioner's acquiescence that respondent's expenses satisfy the statutory criterion (Pet. Br. pp. 20-30), respondent would have been successful in any one of those courts.

Lastly, it is submitted, Congress was certainly aware of the construction placed upon the business expense section (Int. Rev. Code of 1939, §23(a)) by the Commissioner (Pet. Br. p. 14), especially when the 1954 recodification was enacted. However, at that time G. C. M. 24377, and not Revenue Ruling 62-175, stated the Commissioner's official interpretation of the statute, and the Tax Court had not yet glimpsed the error it was later to find in *Longhorn Port-*

land Cement Company, supra. Surely, if the Commissioner had then felt that G. C. M. 24377 expressed an incorrect interpretation adopted only because of the superior authority of *Heininger,* he would have requested corrective legislation. And, had Congress felt that the opinion expressed in G. C. M. 24377 needed nullification, the 1954 recodification would have afforded the most convenient opportunity.

It is submitted that the re-enactment of an unchanged criterion for the deduction of business expenses in the 1954 recodification at a time when both the Tax Court and the Commissioner agreed on the interpretation expressed in G. C. M. 24377 constituted a ratification of that interpretation.

C. This Court's Decisions Since Heininger Establish That It Favors Restrictions on Any Use of the Public Policy Doctrine as a Reason for the Disallowance of Deductions

In *Textile Mills Securities Corporation* v. *Commissioner,* 314 U. S. 326 (1927), this Court sustained the Commissioner's disallowance of various expenses that had been incurred for lobbying purposes. The Commissioner had, by Regulation, ruled that lobbying expenses were nondeductible. The Court said that there is no reason why "the rule-making authority" cannot recognize the Congressional purpose to eliminate lobbying by drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The "overriding public policy" doctrine thus entered into the tax law in the form of approval of an

exercise of administrative rule-making authority to determine deductibility.[6]

When, however, the Commissioner sought to extend that approval to include authority to disallow deductions that had only a remote relation to an unlawful act, this Court was not so willing to approve. In *Heininger* v. *Commissioner*, 320 U. S. 467 (1943), the Court placed the first limitation on the public policy doctrine by containing it within the area of specifically outlawed, as opposed to merely tainted, expenditures.

Too, it was inevitable that the Commissioner would also seek to enlarge the area of outlawed expenses beyond that of those prohibited by Congress. That, too, failed to secure this Court's approval, and, again, in *Lilly* v. *Commissioner*, 343 U. S. 90 (1951), the Commissioner was restricted to only those expenses that were by specific statute outlawed either by Congress or by the legislatures of the various states.

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[6] It is suggested that *Textile Mills* was influenced by the Court's preoccupation with the task of establishing the law of administrative agencies. However, the Commissioner's authority differs considerably from that of a regulatory agency; his general responsibility is rather to administer and interpret the tax law. It is well-settled, today, that the Commissioner cannot make rules either to permit or to "prohibit" deductions. (It is significant that in *Textile Mills Securities Corporation* v. *Commissioner, supra* at 337, the Regulation was characterized as prohibitory.)

The fact that the Commissioner has not promulgated a regulation prohibiting the deductions in the instant case (Pet. Br. p. 13) only proves that he has not had the "hardihood" (*Heininger* v. *Commissioner*, 133 F. 2d 567, 570 (7th Cir. 1943)) to usurp legislative authority to write another prohibitory regulation, and that he had fully accepted the *Heininger* principle. Indeed, he published his acceptance in an interpretive general counsel memorandum (G. C. M. 24377) which is only of slightly lower prestige than a regulation.

In the next case, *Cammarano* v. *United States,* 358 U. S. 498 (1959), the Regulation prohibiting lobbying expenses was again in issue. It has been suggested that the decision was influenced more by the unchanged Regulation which had been in effect since 1918 without Congressional repudiation than by enchantment with the public policy doctrine.[7] However, whereas Congress seemingly had acquiesced in both the Regulation and in *Textile Mills,* the *Cammarano* approval of the Commissioner's view of the same Regulation brought specific and adverse reaction from Congress.[8]

The last words on the subject were said by this Court in the companion cases of *Commissioner* v. *Sullivan,* 356 U. S. 27 (1958) and *Tank Truck Rentals, Inc.* v. *Commissioner,* 356 U. S. 30 (1958). In the former, the Court pruned away two of the Commissioner's favorite contentions: (1) that the statutory language, "ordinary and necessary expenses incurred in a trade or business" is so ambiguous[9] that the unique interpretative skills of the Commissioner are required, and (2) that the well-settled principle that deductions may be denied by Congress creates some kind of presumption that a particular deduction has indeed been denied, requiring the taxpayer to prove the contrary.

In *Sullivan,* this Court recognized that the language of the statute derived from the market place and hence had

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[7] Staff of Joint Comm. on Internal Revenue Taxation, Income Tax Treatment of Treble Damage Payments Under the Antitrust Laws 7 (1965).

[8] Public Law 87-834, §3, amending Int. Rev. Code of 1954, §162 (76 Stat. 960, 973) effective Jan. 1, 1963. H. R. Rep. No. 1447, 87th Cong., 2nd Sess. (1962) pp. 16-18; S. Rep. No. 1881, 87th Cong., 2nd Sess. pp. 21-24 (1962).

[9] That the language of the statute is ambiguous is the fundamental premise of *Textile Mills* (314 U. S. at 338).

to be given its commonly accepted meaning (*supra* at 29). Additionally, in both *Sullivan* (*ibid.*) and in *Tank Truck Rentals* (*supra* at 35), the essential and indispensable function of deductions in the determination of a tax base which correctly measures the taxpayer's ability to pay was recognized in the statement that it is presumed that Congress had intended that the tax be levied on net and not gross income.

It is suggested that in *Sullivan,* this Court repudiated the reasoning of *Textile Mills Securities.* That it did not also repudiate its principle would seem to be attributable only to the fact that, as happened in *Cammarano* v. *United States, supra,* the Court probably remained impressed by the apparent Congressional acceptance of a regulation calling for the disallowance of lobbying expense.[10]

It is believed that no further question involving extension of the public policy doctrine would have been possible after *Sullivan,* were it not for *Tank Truck Rentals,* which despite the apparent acceptance of the reasoning of *Sullivan,* nevertheless, created an exception to the remote relation rule of *Heininger.*[11] However, it is also believed that *Tank Truck Rentals* is this Court's response to an extremely unique factual situation, but does not constitute a real relaxation of its determination to construe the business expense statute without any esoteric public policy

[10] Public Law 87-834 modifying the *Commarano* interpretation of the lobbying Regulation was enacted subsequent to that decision.

[11] Cf.: *Farnsworth* v. *Commissioner,* 270 F. 2d 660 (3rd Cir. 1959), *cert. denied* 362 U. S. 902; *Keystone Metal Company* v. *Commissioner,* 264 F. 2d 561 (3rd Cir. 1959).

complications.[12] Furthermore, it is suggested that the logic of *Tank Truck Rentals* cannot be carried over into the area of attorney fees.

II.

The reasoning of *Tank Truck Rentals* cannot logically be applied to support the disallowance of attorney fees.

A. The fact that the Court in *Tank Truck Rentals, Inc. v. Commissioner,* 356 U. S. 30, 35 (1958) felt the need to declare that the "standard" of remote relation established in *Heininger* required "flexibility" is proof that the Court considered that the *Heininger* rule had been established as a general rule, and that it was not specifically limited in any way to the specific facts in that case. Hence, it is apparent that the Court in *Tank Truck Rentals* generally classified fines as remotely related expenses that ought to be controlled by the *Heininger* rule, but excluded them by way of an exception. That reasoning therefore clearly also classifies the counsel fees here as remotely related expenses, to which the *Heininger* rationale is applicable, unless the rationale of *Tank Truck Rentals* constitutes them an exception, too.[13]

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[12] In *Sullivan* (*supra* at 29) the Court said, speaking of its rule that the statutory language of Section 162 should be given its accepted meaning,

> ". . . That is enough to permit the deduction, unless it is clear that the allowance is a device to avoid the consequence of violation of law, as in *Hoover Motor Express Co.* v. *United States, supra,* and *Tank Truck Rentals, Inc.* v. *Commissioner, supra,* . . ."

[13] These observations also establish that both the Tax Court in *Thomas A. Joseph,* 26 T. C. 562 (1956), and the Commissioner in Revenue Ruling 62-175, were wrong in emphasizing the fact that

Tank Truck Rentals, Inc. v. *Commissioner, supra,* carved out an exception to the *Heininger* rule. That exception is based squarely on the theory that the deduction of fines reduces the "sting" of such fines as a deterrent to crime (*supra* at 36). Therefore, the "severity and immediacy of the frustration resulting from the deduction" is almost equal to that accomplished by the offense itself (*supra* at 35), because "the allowance of a deduction for fines would but encourage continued violations of state law by increasing the odds in favor of noncompliance. . . ." (*Ibid.*)

Hence, it follows that unless the allowance of counsel fees will have a similar or equal frustrating effect on the policy expressed in the statute, the circumstances which prompted the *Tank Truck* exception are not present, and no reason exists for a further relaxation of the general *Heininger* rule to also disallow such fees.

The Commissioner obviously recognizes that, if the *Tank Truck* exception is to be carried over to counsel fees, it is incumbent upon him to establish an analogy between counsel fees and fines in connection with their effect on the potential of prohibitory statutes to achieve their ends. The Commissioner, therefore, argues, "Respondent's attorney's fees in connection with his criminal trial are intimately and inextricably connected with the entire legislative and judicial machinery for preventing, combating, and punishing crime. . . . Such expenses are no more remote from illegal conduct than the fine levied upon conviction, which this

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the counsel fees in *Heininger* had been expended in defense of charges tried before an administrative agency, and consequently in reading *Heininger* as establishing only a particular and not a general precedent.

Court has already held nondeductible in *Tank Truck Rentals. . . .*" (Pet. Br. p. 12.)

It is plain that the Commissioner is saying that the allowance of a deduction for counsel fees has the same deleterious effect on the realization of the policy goals of a statute as does the allowance of deductions for fines levied either to achieve conformance with, or to punish violations of, that statute. In the light of the reason given by this Court for the disallowance of fines, the Commissioner therefore uses the analogy with fines to really advance the argument that the allowance of counsel fees "would but encourage continued violations by increasing the odds in favor of noncompliance . . ." *Tank Truck Rentals, Inc.* v. *Commissioner, supra* at 35.

This is a noxious contention. It cannot be based on any statement made by this Court. Clearly, this Court had absolutely no conviction that it was thwarting the enforcement of penal statutes (or mitigating the punishment imposed by such statutes) when in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), it ruled that a defendant could not be tried for the violation of any penal statute unless he is represented by counsel, even if such representation had to be supplied at public expense.

Neither did a former Solicitor General, as amicus curiae on behalf of the American Civil Liberties Union in the same case, have any fear that he was encouraging criminality, when he urged that a defendant who has been deprived of counsel has not been tried by due process. (Brief for the American Civil Liberties Union, p. 7, *Gideon* v. *Wainwright, supra.*)

It is evident that the Commissioner misreads the rationale of *Tank Truck,* because he takes it out of its prece-

dential context. The true rationale can be discovered, it is suggested, only when proper consideration is also given (1) to this Court's statement in the companion case of *Commissioner* v. *Sullivan*, 356 U. S. 27, 29 (1958) that the deduction is allowable unless used as "a device to avoid the consequence of violation of a law, . . . as in *Tank Truck Rentals, Inc.* v. *Commissioner, supra,* . . . ", (2) to the finding in *Tank Truck Rentals, Inc.* v. *Commissioner, supra* at 33, that the taxpayer "deliberately operated" in an unlawful manner at a "calculated risk", and (3) to the statement in *Hoover Motor Express Co.* v. *United States,* 356 U. S. 38, 40 (1958), also a companion case, that the taxpayer made no effort to avoid violations of the statutes.

The decisions in *Tank Truck* and *Hoover Motor Express* express this Court's distaste for a taxpayer's policy of weighing the tax cost of fines against the tax cost of conformance with law. The Court obviously felt that in such circumstances, the tax cost of disallowance of fines should be added to the scale on the side of conformance with law. It is evident that the Court expressed an ethical judgment in relation to unique circumstances, but one which, if applied indiscriminately, can result only in mischief.

It is completely unfair to this Court to stretch what this Court said in those two cases so as to make it seem that this Court would say that the employment of counsel encourages criminality, or that the Constitutional guaranty of right to counsel must give way before an implied Congressional purpose that the tax law not be used to encourage violations of statutes. (That the idea that the allowance of deductions for counsel fees supplies a tax benefit is completely fallacious is discussed in Point III *infra*, pp. 26-28.) At least since *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), no one can

say that this Court has not been zealous in the protection of the Constitutional guarantee of the right to counsel.

B. That same faulty logic which perverts this Court's statements into authority for the denial of the fundamental right to counsel for the purpose of suppressing illegality leads to the Commissioner's criticism of the Second Circuit's opinion for a failure to find a policy requiring the discouragement of employment of counsel within the proscriptive statutes themselves.

How could the Second Circuit find such purpose within those proscriptive statutes? This Court, in *Heininger* could not find it, either.[14] Instead, in *Heininger,* this Court, said that it was not the purpose of those proscriptive statutes to "deter" the employment of counsel in defense of charges of violation of those statutes, and that to disallow deductions for counsel fees would be "to attach a serious punitive consequence" which Congress had not indicated *in the statutes* themselves should result from the determination of guilt (320 U. S. at 474).

Whereas this Court had said that about a deduction for counsel fees in the context of an administrative hearing to

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[14] By no stretch of the imagination can it be visualized that any state statute contemplates that the Commissioner, a federal agency, will make disallowances on federal returns to punish infractions of the state statutes. Neither can it be contended that the Commissioner or the federal judiciary has the authority to determine which infractions of state law should, and which should not be so, punished. Nevertheless, that is one of the unexpected (and it is submitted, undesirable results that has followed from the decision in *Tank Truck Rentals, Inc.* v. *Commissioner, supra.* (*Keystone Metal Company* v. *Commissioner,* 264 F. 2d 561 (3rd Cir. 1959); Rev. Rul. 61-210, 1961-2 Cum. Bull. 162.) Cf. *Dukehart-Hughes Tractor & Equipment Co., Inc.* v. *United States,* 341 F. 2d 613 (Ct. Cl. 1965), where the Court of Claims was called upon to determine whether a state law made certain business acts unlawful.

determine guilt, the Second Circuit's statement, expressing the identical thought, was couched in Constitutional language, as was required by the fact that the counsel fees in this controversy had been expended in a criminal trial involving liberty and not merely money. The Second Circuit very properly said that since Congress could not put into any statute the purpose of denying the right to counsel without abridgment of the Constitution, it could not be presumed that Congress had intended to deny counsel fees as a punishment.

Moreover, the Acting Solicitor General says hardly less when he comments that the policy advocated by the Commissioner "would impose a penalty in proportion to the amount of the illegal expenditure and the taxpayers income tax bracket, rather than the seriousness of the offense committed" (Pet. Br. p. 16); for, that policy, too, would raise such grave Constitutional questions, that neither could it be presumed to be a Congressional purpose.[15]

C. Equally fallacious is the Commissioner's use of the principle in *United States* v. *Gilmore,* 372 U. S. 39, 49 (1963) to attempt to convince the Court that "respondent's legal fees are the direct and predictable result of his violations . . ." so that "their deductibility must be considered in the light of the public policy embodied in those statutes . . ." (Pet. Br. p. 9). The Court answered that contention in *Heininger* when it said (1) that the public policy embodied in those statutes does not include that of disallowance of counsel fees, and (2) that the attorney fees were the direct and predictable results of the law-suit and not

[15] Moreover, it would be completely at odds with the basic Congressional purpose that the cost of government be borne in proportion to financial ability.

of the violations. Counsel fees are only the remote results of the violations, and that was the very reason for the principle of *Heininger.* The Commissioner errs in calling counsel fees the direct result of the taxpayer's "violations."

III.

It cannot be presumed that Congress intended to abridge a constitutional right.

A. *The Commissioner Aims His "Overriding Public Policy" Argument Exclusively Against Counsel Fees in a Criminal Prosecution, Singling Out for Disallowance the Only Expense in This Case Which Is Protected by a Constitutional Guarantee*

In the circumstances of the Commissioner's concession that respondent's attorney fees fully satisfy all the statutory requirements for allowance as ordinary and necessary business expenses, it must also be taken as conceded that those fees have precisely the same statutory standing as any other expense incurred in carrying on respondent's business; viz., rent, wages, telephone, etc.[16] Nevertheless, attorney fees have been disallowed by the Commissioner, though such fees would have been allowed, had respondent been successful in defeating the criminal charge, or—re-

[16] The Acting Solicitor General's assertion that the Second Circuit would agree that the expense of defending a suit arising out of personal acts is nondeductible and his quotation from the Tax Court's decision that Constitutional guarantees do not cause a transmutation of personal expenses into business expenses are completely irrelevant. No one has made contrary claims, and this controversy is not over the deduction of personal expenses. The taxpayer deducted the fees as a business expense, and the Commissioner's reason for disallowance was not that the fees were a personal expense, but that they were unallowable even though a business expense.

gardless of outcome—had the defense been in an administrative hearing even on the same statutory violations.[17]

The vital point is that of all the expenses that respondent has incurred in a single business (or that are incurred by any businessman), the Commissioner has selected only the expense which has Constitutional stature as his target.[18] Since the Commissioner claims that his action has the implied consent of Congress, and since, surely, it cannot be presumed that Congress intended to abridge a Constitutional right, the question inevitably becomes whether that policy of disallowance aimed exclusively at an expense, incurred in pursuit of a constitutionally protected right, constitutes an abridgement of that right.

That question, it is suggested, may be resolved on the basis of the economic impact of disallowances of business expenses. If a disallowance should make it more difficult, more costly, or impossible to incur the expense, the fact that *only* the Constitutionally protected expense has been so burdened surely establishes that a Constitutionally protected act has been economically discriminated against. The imposition of a discriminatory, additional and special tax

[17] The Acting Solicitor General confirms that the Commissioner aims exclusively at attorney fees incurred in a lost defense against charges of a crime when he argues that disallowing only one out of all the remotely related expenses hardly amounts to taxing respondent's business on the basis of gross receipts (Pet. Br. p. 13, fn. 11). Parenthetically, it must be added that what the Commissioner seeks to do does not make respondent's business taxable on the basis of net income, either. Yet, it is the latter and not the former, that the statute intends.

[18] It may be noted that although the right to counsel is an administrative proceeding is specifically provided by statute (Administrative Procedure Act §6(a), 60 Stat. 237 (1946), 5 U. S. C. §1005), only in the case of a criminal charge does it fall squarely within the ambit of the Sixth Amendment.

on only the exercise of a Constitutionally protected right is not by any stretch of imagination equal to the adoption of the "hands-off" position towards that right (cf. *Cammarano* v. *United States,* 358 U. S. 498, 515 (1959) separate opinion by Mr. Justice Douglas), which is the barest minimal with which Congress should treat Constitutional rights.

B. *The Suggestion That Allowance Would Subsidize a Constitutional Right States a Fallacious and Inexpert View*

Since in the present posture of the law, it may perhaps be argued here that there is no requirement that a Constitutional right be subsidized (although in connection with the Constitutional guarantee of the right to counsel, as Chief Judge Lumbard showed (Tr. 18), the law has been subject to much recent review), and because the Acting Solicitor General has intimated that allowance of the deduction may involve a subsidy, it is felt that it would be appropriate at this point to refute that notion by an analysis of the real economic effect of deductions for actual business expenses.

The Acting Solicitor General (though confessing doubts that Congress intended the disallowance of illegal payments (Pet. Br. p. 17), suggests that because the allowance might "increase the violator's chances of profiting from illegal conduct; . . . [and because] . . . it is difficult to believe that Congress . . . could have intended the federal treasury in effect to provide a part of the money for an illegal payment . . . .", this Court must choose between adding a penalty or subsidizing the illegal payments (Pet. Br. pp. 16, 17). The issue thus presented to the Court is drawn from a hypothetical statement of facts (Pet. Br. p. 15). It is sub-

mitted that the Acting Solicitor General's own hypothetical facts establish beyond any question that the government never pays any part of an illegal payment that is proximately related to a trade or business, and that the government will not pay any part of respondent's legal fees, which, concededly, are the proximate result of respondent's business.

The hypothetical facts drawn by the Acting Solicitor General are as follows:

A taxpayer sells merchandise for	$50,000.
He has paid for the merchandise	37,500.
His prime profit is	$12,500.
In order to make the sale, he was obliged to pay a bribe of	10,000.
His actual profit is	$ 2,500.
Tax liability, if expense deduction is disallowed (at 50% of $12,500.)	$ 6,250.
Tax liability, if expense deduction is allowed (at 50% of $2,500.)	1,250.
Difference	$ 5,000.

The fact that the Commissioner will extract a tax payment " . . . more than double his actual profit from the transaction . . . .", if the deduction is disallowed, is much too clearly visible to be overlooked. Consequently, the Acting Solicitor General correctly calls it a "penalty in proportion to the amount of the illegal expenditure and the taxpayer's

income tax bracket, rather than [to] the seriousness of the offense committed . . . . " (Pet. Br. p. 16).[19]

The Acting Solicitor General fails to specifically state, though it is just as evident from the facts, that if the tax is collected under authority of a tax on net income, the disallowance will result in an overcollection of $5,000. That amount, however, is precisely the amount that he also says the taxpayer's tax liability will be reduced should the deduction be allowed. There is obvious error in a contention that claims that the Treasury is making a refund when it refrains from an unlawful collection of a tax. In truth, the Acting Solicitor General has completely begged the determinative question: Is the $10,000. payment a cost of earning the profit? That is so, because there is neither authority nor justification anywhere in the tax law to collect a tax on a profit increased by the cost of making that profit. Surely, if the $10,000. payment were salary to a salesman, the Acting Solicitor General would not be contending that the federal treasury had paid it.

The Acting Solicitor General overlooks that allowance of a deduction puts nothing into a taxpayer's pocket; he has been obliged to make the expenditure before he could earn the profit that the government taxes. As the hypothetical facts clearly show, disallowance adds the tax to the expense. In fact, if the expense is disallowed, the government will

[19] The Solicitor General does not, however, suggest what authority there would be in the tax law for its use as a punishment for violation of law, even if the Court should devise a formula for making the punishment, after addition of the tax penalty, equal to the seriousness of the offense.

Neither does he suggest any authority for the use of the federal tax law as an instrument for punishment of violations of state law.

profit from the illegality because it has demanded more than its tax share only because the payment was illegal.

Moreover, by the very mechanics of the method of computing tax liabilities, the disallowance of an actually incurred business expense results in the creation of fictitious income.[20] (Real income can result only when the deduction is disallowed because not spent.) The basic error in equating the allowance of a deduction with a tax subsidy lies in the overlooking of the lack of reality in the "income" "created" by disallowance of an actual business expense.

The disallowance does not return to the taxpayer a single real penny of the money he had to actually pay someone to earn his profit. The "income" figure arrived at by disallowance of the deduction merely attributes money to the taxpayer which he does not really possess. Since the "income" is not real, even when "created" by the disallowance, it could not have been real before it was created, and it cannot be that the Treasury paid anything real when it was left uncreated.

The government's position, when it acquiesces in the deduction of an actually incurred business expense is no more than a neutral one,[21] neither giving nor taking. It gives

[20] Taxable income is equally increased either by the addition of income or by the disallowance of expenses.

[21] In the consideration of the Bill that became the Revenue Act of 1964 (78 Stat. 19), Congress gave consideration to elimination of deductions for payment of state property and income taxes, and sales taxes. The elimination of these deductions would have had comparable effect to that of the disallowance of business expenses, since they would have increased taxable income by reason on non-recognition of payments, actually made. Congress decided against the proposal, because "[a] failure to provide deductions . . . could mean a combined burden of income taxes which in some cases would be extremely heavy. . . ." The Committee also said

only when it allows an expense, not incurred, or allows it in an amount greater than its reality. Similarly it takes only when it refuses to allow an expense that has been made, or allows it in an amount less than it has been made.

Taxes are practical matters that deal with economic facts. Income is income only when real and a payment is such only when something of value has been transferred. The illegality of a payment or the relation of a payment to illegality does not change any economic fact surrounding or arising from that payment.

C. *The Commissioner's Rule Results Not Only in the Imposition of a Severe Penalty for Failure in the Defense Against Criminal Charges, But Also Exerts Massive Pressure Against a Choice to Defend Against Such Charges*

A determination of the extent of the economic handicap that is imposed on the right to counsel by a disallowance of the cost of such counsel necessarily requires that the effect of the disallowance on real dollar-and-cents income be measured. That is so because the statutory definition of taxable income (formerly [statutory] net income) is no more than a reflection of real income. Real income exists as a fact quite unaffected by any Congressional definition.

The sole function of taxable income is to supply a base for taxation. The tax is computed by application of grad-

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it was "important for the Federal government to remain *neutral* as to the relative use made of these three forms of State and local taxation. . . ." (Emphasis added) (H. R. Rep. No. 749, 88th Cong., 1st Sess. (1963); S. Rep. No. 830, 88th Cong. 2nd Sess. p. 54 (1964).

It is clear that Congress had no idea that it was paying a part of the taxes to the states and local governments. On the contrary, it recognized that by permitting the deductions for tax payments actually made, it was standing aloof—doing nothing. Congress called that position "neutral".

uated percentage rates to that base, but since the tax must be paid in real dollars, the effective rate of taxation is not a percentage of taxable income, but rather a percentage of real income.

The tax law is designed to take a share of a taxpayer's income and to leave a balance for him to save or to spend as he wishes. Since the amount of the tax is determined by the combined effect of deductions, credits, and the tax-rates, the percentage of the tax-bite out of real income is similarly effected by that same combination. Hence, a change in any one of the three is equally capable of effecting a change in the effective rate of taxation.

When the tax law departs from economic reality by permitting the taxpayer to deduct as an expense an amount that is in excess of reality, or which has no basis in reality, taxable income is falsely reduced below real income. Therefore, the variation thus effected results in real income excused from tax. Such income consequently does not stand any tax cost and it is available for the taxpayer's personal use unreduced by any tax payment. (Good examples are deductions allowed in amounts other than at cost; viz., deductions for charitable contributions, the percentage depletion allowance for oil properties.)

However, when the tax law falsely inflates taxable income by refusing to allow an actual expenditure or by allowing it in an amount below reality, taxable income is increased by a fictitious amount which nevertheless produces a real tax. (For example: No loss on transactions between certain related persons is allowable, even when bona fide; the limited deduction for so-called non-business bad debts, though such loans were not made for personal reasons.) But, the government will not accept payment in fictitious

income. Therefore, the tax on such income must be paid out of income which does exist. Consequently, the taxpayer is required to dig into the balance which is rightfully his by reason of tax already paid. The tax cost on such fictitious income is therefore paid out of the already tax-paid share from other sources, and constitutes an additional tax burden on that share of income which the taxpayer, by right, should have free from tax.

The result is that the taxpayer loses the right to personal use with respect to the funds from the other sources that he has earned by payment of the tax. He loses the benefit for which he paid a tax, and to that extent the tax has been wasted. Those funds are paid as an additional tax penalty of a fictitious increase in income, and lost to the taxpayer. The tax cost of a personal expense however is merely the tax cost of making it available for personal use; it does not also pay a tax for its "creation".

The reduction of available funds resulting from the disallowance of real business expenses also produces a real economic dilemma, which is graphically illustrated by the Acting Solicitor General's hypothetical case.

Prime Profit	$12,500.
Tax, if he wins	1,250.
Tax, if he loses	6,250.

Hence, should he win, he was safe in spending the $10,000. for employment of counsel, because he will have a surplus for taxes. (In fact, he can spend the full $12,500 because he will not owe any taxes). However, should he lose, the expenditure of $10,000 for counsel fees will cost him an additional $5,000, for the payment of which he will have only $1,250. still available out of the transaction (assuming

he had not spent it). If that were the taxpayer's only business transaction, and if he had no other accumulated tax-paid funds, he would really be in trouble to find the additional $3,750. that the Commissioner would demand.

That is, indeed, a cruel dilemma with which to confront a taxpayer at the moment that he is charged with violation of a penal statute. Neither he, nor anyone else, can be sure whether our hypothetical taxpayer has $12,500, or $6,250. to spend for counsel fe[illegible] in his defense.[22] That may make the difference in his defense.

Moreover, he cannot borrow against his tax liability, hoping to earn enough subsequently to pay it, because he must estimate and prepay his tax liability. Since underestimation subjects him to an additional penalty and willful underpayment is also a criminal offense (Int. Rev. Code of 1954, §7203), the taxpayer has no alternative but to choose his course of action in the crminal proceeding with cautious consideration for the severity of the tax consequences that will follow, should he be unsuccessful in his own defense.

The threat of the tax penalty follows him throughout his effort to obtain vindication. If, originally, he has gambled, using his funds to the maximum to pay for his defense, and he loses, his tax debt to the Treasury as a consequence, may be enough to bankrupt him and to impoverish his family. Yet, he must gamble again, if he seeks an appeal. The tax penalty follows him as additional punishment for losing in every step of his fight for vindication.

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[22] The Tax Court has gone so far as to say that when the taxpayer appeals the verdict, the determination of deductibility is suspended until the appeal is decided. *Joseph Cohen*, 2 CCH Tax Ct. Mem. 602 (1943).

The omnipresence of the tax penalty is no different than would be that of the tax collector's continuous presence at the side of the taxpayer, when he pleads or decides on an appeal, warning him that he defends at the risk of a tax penalty. It exerts massive pressure against a choice of putting up a defense. It destroys a taxpayer's freedom to defend himself. No civilized nation would subject an accused to pressure of that kind. It is an insult to Congress to say that Congress intended to exert that kind of pressure against a defendant's freedom to choose to defend himself.

The application of "overriding public policy" is analogous to the Commissioner forcing the taxpayer to place a side wager on the outcome of the trial, but a wager of such adverse consequence to the taxpayer that it has the power to force the taxpayer to decide not to take the risk. However, he cannot avoid that risk, unless he gives up his right to defend himself. It is a cruel doctrine, completely beneath the dignity of a great government.

CONCLUSION

The decision and judgment of the Court below should be affirmed.

Respectfully submitted,

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